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In The Supreme Court of the United States

MARIA C. FERNANDEZ,

Petitioner,

v.

MICHAEL V. HAYDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do The United States District Court For The District Of Maryland And The United States Court Of Appeals For The Fourth Circuit Refuse To Recognize The Existence Of Gender Discrimination Subsumed Within Acknowledged Military Bias Against Female, Civilian Managers Working Within Certain Federal Agencies?

PARTIES TO THE PROCEEDING

Petitioner

Maria C. Fernandez

Respondent

Michael V. Hayden

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

APPENDIX TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....18

REASONS FOR GRANTING THE WRIT.....20

CONCLUSION.....36

APPENDIX TABLE OF CONTENTS

Memorandum District Court Judge Motz
Dated August 24, 2006 1

Order District Court Judge Motz
Dated August 24, 2006 22

Memorandum District Court Judge Motz
Dated August 27, 2007 24

Order District Court Judge Motz
Dated August 27, 2007 28

Opinion of the 4th Circuit Court
Dated January 12, 2009 29

Judgment 4th Circuit
Dated January 12, 2009 32

TABLE OF AUTHORITIES

FEDERAL CASES

Causey v. Balog
162 F.3d 795, 801 (4th Cir. 1998) 34

Cook v. CSX Transp. Corp.
988 F.2d 507, 511 (4th Cir. 1993) ..... App. 13

Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310
(4th Cir. 2005) ..... App. 14

Harrods Ltd. V. Sixty Internet Domain Names, 302 F.3d 214, 244
(4th Cir. 2002) .....App. 17

Honor v. Booz-Allen & Hamilton
383 F.3d 180, 188 (4th Cir. 2004) .....App. 15

Nguyen v. CAN Corp
44 F.3d 234, 242 (4th Cir. 1995) ..... App. 17

Oncale v. Sundowner Offshore Services, Inc.
523 U.S. 75 (1998) 35

Phillips v. Martin Marietta Corp.,
400 U.S. 542 (1971) 35

Williams v. Howard Johnson's, Inc. of Washington, 323 F.2d 102, 105
(4th Cir. 1963) ..... App. 16

FEDERAL STATUTES

28 U.S.C. 1254.....2
28 U.S.C. 1291..... 2
28 U.S.C. 1331..... 3
28 U.S.C. 1343(a)(4)..... 3
28 U.S.C. 1346..... 4
42 U.S.C. 2000, et. seq.....7

RULES

Rule 56(f)..... 17
Title VII..... 20, 23, 34, 35
Federal Rules of Civil Procedure, Rule 56(g) 17
Rule 56(f) Fed.R.Civ. P. 56(f) (g).....17

Other

Gender Camouflage, Women and the U.S. Military", New York University Press, New York, 1999 21

Petitioner, Maria C. Fernandez (Fernandez) respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The Equal Opportunity Employment Commission ("EEOC"), Baltimore District Office, issued an unreported order of dismissal on August 2, 2002. This Order was upheld by the Office of Federal Operations of the EEOC in an unreported decision dated March 24, 2004. The United States District Court for the District of Maryland issued an unreported memorandum opinion granting the Respondent's Motion to Dismiss Count One of the Petitioner's Complaint on August 24, 2006. Count Two of the Petitioner's Complaint was dismissed pursuant to an unreported memorandum opinion of the District Court on August 27, 2007. The United States Court of Appeals for the Fourth Circuit upheld the District Court's dismissals of Petitioner's claims in an unpublished *per curiam* opinion on January 12, 2009.

JURISDICTION

The Petitioner respectfully submits this petition for certiorari pursuant to Rule 13 of the Rules of Procedure of the Supreme Court of the United States to review the decision and order of the United States Court of Appeals for the Fourth

Circuit issued in Case No. 08-1118 on January 12, 2009. Jurisdiction is vested in this Court pursuant to the provisions of 28 U.S.C. sec.1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District

Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections **1292**(c) and (d) and **1295** of this title.

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section **1985** of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section **1985** of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil, including the right to vote.

(b) For purposes of this section —

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of

Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section **7429** of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section **453**(2) of title 3, by a covered employee under chapter 5 of such title.

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42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in,

any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion. Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 (**50 U.S.C. § 781** et seq.).

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if —

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or

administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section **206**(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases.

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to

demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (**21 U.S.C. § 802**(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act (**21 U.S.C. § 801** et seq.) or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment

or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders (1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws —

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had —

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to —

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment

or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section **1404** of title 28.

Fed. R. Civ. Proc. 56 (f), (g)

(f) Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purposes of delay, the court shall forthwith order the party employing them to pay the

other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

On December 21, 1999, the Petitioner, Dr. Maria C. Fernandez, filed a claim against her employer, the National Security Agency of the United States ("NSA") with the Equal Employment Opportunity Commission ("EEOC") pursuant to 42 U.S.C. sec. 2000e *et seq*. The NSA conducted a formal investigation of Dr. Fernandez's complaint and issued an Investigative Summary. NSA issued a final agency decision on September 17, 2002, determining that Dr. Fernandez was not discriminated against. Dr. Fernandez appealed, and the Office of Federal Operations upheld the agency decision on March 24, 2004. Ultimately, Dr. Fernandez received a "right to sue" letter. On September 24, 2004, the Petitioner filed a two count Complaint and Request for a Jury Trial in the United States District Court for the District of Maryland. In addition to 42 U.S.C. 2000e et seq., jurisdiction was based upon 28 U.S.C. 1331 as a case raising federal questions; 29 U.S.C. 1343(a)(4) as an action to recover damages under an Act of Congress providing for the protection of civil rights and 28 U.S.C. 1346 as a claim against officers and agents of the United States.

In Count One of her Complaint, Dr. Fernandez alleged a hostile work environment claim, a disparate treatment claim and a retaliation claim. Count Two alleged a further retaliation claim.

On October 17, 2005, NSA moved to dismiss Dr. Fernandez' Complaint on the pleadings or, in the alternative, on summary judgment. On January 10, 2006, Dr. Fernandez, opposed NSA's alternative motions, and filed a Motion to Conduct Discovery pursuant to Federal Rule 56 (f).

On August 24, 2006, the United States District Court for the District of Maryland (Motz, J.) issued a Memorandum Opinion granting Summary Judgment as to Count I of the Petitioner's Complaint and denying NSA's Motion to Dismiss Count II. In addition, at this time, Judge Motz denied the Petitioner's request for the opportunity for discovery as to Count I and granting it as to Count II. With respect to the summary dismissal of Count One, Judge Motz held that the Petitioner's hostile work environment claim failed because she did not show that the hostile acts complained of were based on Fernandez's gender or national origin. In so ruling, Judge Motz specifically mentioned that Dr. Fernandez failed to meet her burden since it was unclear whether or not the wrongful conduct she complained of was motivated by gender or civilian status.

After the completion of discovery as to the Count II allegations, NSA renewed its Motion for Summary Judgment as to Count II. On August 27, 2007, Judge Motz issued his second Memorandum Opinion in this

case, granting Summary Judgment as to both Count I and Count II and terminating the matter before the District Court without the opportunity to conduct discovery as to the allegations of Count I and without a jury trial having been conducted on either Count I or Count II.

Dr. Fernandez appealed this decision to the United States Court of Appeals for the Fourth Circuit where she presented several issues, including whether or not the military bias against civilian employees that was found to exist in NSA's investigation, and acknowledged to exist by the trial court, constituted a form of gender bias prohibited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000, *et seq*. On January 12, 2009, the Court of Appeals issued an unpublished *per curiam* opinion in which it affirmed Judge Motz' decision without specifically addressing the issues presented by Dr. Fernandez.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAVE REFUSED TO RECOGNIZE THE EXISTENCE OF GENDER DISCRIMINATION SUBSUMED WITHIN AN ACKNOWLEDGED MILITARY BIAS AGAINST FEMALE, CIVILIAN MANAGERS.

In the introduction to their work, "*Gender Camouflage, Women and the U.S. Military*", New York University Press, New York, 1999, @ pp. 5-6, Francine D'Amico and Laurie Weinstein make the following observations regarding the treatment of women in the military culture:

> [W]hen American women enter the United States military institution, they enter hostile territory: it is quite literally, No-Woman's-Land. To survive in this hostile environment, servicewomen adopt one of a variety of coping strategies for self-protection. These strategies differ in the gendering of the subject. Each day, the servicewoman must (re)construct her gender identity: Should I try to be 'one of the guys,' that is, adopt a passing strategy, hoping for male bonding to extend to include me? Or should I be 'one of the girls,' that is become ultra-feminized, hoping for brotherly affection or chivalric protection? Should I try to be a 'soldier,' that is, aim for a seemingly gender-neutral professionalism, hoping for mutual respect? Or should I be a crusader, mounting a conscious – and be personally and professionally risky – challenge to the structure of the gender relations in the institution?
> * * *.

Although individual women don gender camouflage to survive in a hostile institution, the military itself must camouflage the multiple ways in which it depends upon the

> skills, talents, energies, and support of people gendered feminine. The military must camouflage its reliance on womanpower in order to maintain its self-image as a quintessentially masculine institution in society, the place where boys become men and no girls are allowed. To do this, the institution denies women an official place and marginalizes them through the use of sexual harassment and assault, professional disparagement and de-qualification, and distinctions between combatant and noncombatant, service member and dependent, insider and outsider.

D'Amico and Weinstein make clear that the military bias against women extends to all areas in which women and the military co-exist, including, as here, civilian females working alongside of military personnel:

> Women have been excluded in another way: their work for the military – whether as warriors, wives, civilian employees, volunteers, defense workers, or prostitutes/sex workers – has often been unacknowledged. * * * Women's military roles and contributions are made invisible – until women make themselves visible by challenging gender boundaries. D'Amico and Weinstein @ p. 4

The instant case presented the United States District Court for the District of Maryland with a claim involving the precise type of gender

discrimination complained of by D'Amico and Weinstein. The Petitioner maintained that she, and many other civilian females who are employed in management positions by federal agencies which employ both civilian and military personnel, are the subject of this insidious type of discrimination which masquerades as military bias against civilians, but which is, in reality, deeply rooted gender bias against females in management roles. By their rulings in this case, the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit have closed their eyes to the existence of this type of discrimination which is being practiced daily within certain federal agencies and simultaneously even denied the Petitioner any opportunity to engage in the exercise of appropriate discovery in order to prove her causes of action. By doing so, these courts have decided important federal questions in a manner which conflicts with the many cases in which this Court has interpreted Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000, *et seq*. A brief review of some of the pertinent parts of the record developed below demonstrates beyond cavil that the military bias against females has infiltrated the ranks of federal agencies staffed by military and civilian personnel, such as NSA. Indeed, the treatment afforded Dr. Fernandez at the hands of her military peers began with professional disparagement and an attack upon her qualifications, moved into the area of sexual innuendo and finished with episodes of disparate treatment and retaliation.

Dr. Maria C. Fernandez, is a female of Cuban descent and a naturalized citizen of the United States. She became employed as a civilian employee of the National Security Agency ("NSA") in 1983 as a level GS-9 analyst. Over the years, Dr. Fernandez developed a reputation as a hard working and competent employee and achieved the grade of GS-13 in 1990. Up until her advancement to the position of Branch Chief, Dr. Fernandez' job evaluations had always been good, and she was never the subject of any disciplinary action.

In August of 1998, Dr. Fernandez became a Branch Chief of what was known as the P211 branch, a part of NSA's P21 Division of the P2 Program Office. P21 was comprised of four (4) branches each being supervised by a Branch Chief who was either a civilian or a military employee of the Agency. The four branches and their respective Chiefs were as follows: P211 (Dr. Maria C. Fernandez, Chief, civilian); P212 (Lt. Col. Charlene ("Charlie") L., Chief, active military); P213 (Ray G., Chief, civilian) and P214 (Sharon P., Chief, civilian). Christopher S., a male and former member of the military, served as Dr. Fernandez' subordinate in P211.

In August of 1998, the Branch Chiefs reported to John M., the Division Chief of P21. As of September, 1998, Dr. Fernandez began to report to Lt. Col. Thomas K. (active military), Deputy Chief of P21 who became Division Chief in June of 1999. Col. Leslie "Steve" M. (active military) served as the Chief of P2 and supervisor of Lt. Col. Thomas K. Dr. Fernandez' troubles at NSA began in September of 1998 within weeks of her appointment as Branch

Chief of P211. P211 was designated as the "Requirements Branch", and at the first Division level staff meeting that Dr. Fernandez attended, Lt. Col. L. opined that there was no need for a Requirements Branch and no reason for Dr. Fernandez to be at the staff meeting. At this time, Dr. Fernandez avoided any confrontation with Lt. Col. L., but subsequently, she witnessed or learned of similar remarks that Lt. Col. L. made concerning other civilian women employees holding management positions within the Agency.

In June of 1999, during another Division level staff meeting, P214 Branch Chief Sharon P. asked Dr. Fernandez a question, and when she began to respond, Lt. Col. L. launched into an unprovoked attack upon Dr. Fernandez in which she questioned Dr. Fernandez' competence, professionalism, knowledge, management skills, and most tellingly, her position as supervisor of a male subordinate (e.g., Christopher S.). Lt. Col. L. then arose from her chair in what was perceived by Dr. Fernandez as a threatening manner, and ordered her to turn over all the information and documentation being discussed to Christopher S., Dr. Fernandez' male and ex-military subordinate. This incident was recalled by P214 Branch Chief Sharon P. as follows:

> * * I was dumbfounded by the incident and taken aback – shocked by it. I felt that I must have missed something since I did not understand the reason for the comment and action. * * * I have worked in four military dominant environments in the Intelligence Community plus offices at the Agency with

> military personnel throughout my career; I think office environment is personality driven. There are good and bad civilians just as there are good and bad military personnel. Which brings me to my point, I consider certain behaviors to be beyond the realm of what should be considered appropriate for the workplace. The office included various individuals with strong personalities. In the same vein, the office lacked common courtesy, as well as standard business conduct and procedures. Further, it seemed to lack recognition/acknowledgement of – respect for the civilian chain of command. A majority of the personnel in the office were military or retired military. One way to describe it – there was an undercurrent in the office, a subliminal fraternity of the military and retired military personnel (a boys club) within the office that lent itself to disrespect toward pure civilian or better said – pure female civilian management.

Throughout 1999, Lt. Col. L. systematically excluded Dr. Fernandez from access to information that she needed to do her job. Instead, Lt. Col L. chose to provide information to Christopher S., Dr. Fernandez' male and ex-military subordinate. On August 31, 1999, Dr. Fernandez complained to Lt. Col. L. that she had for a number of months denied Dr. Fernandez access to information which was necessary for Dr. Fernandez to do her job, and she needed the information immediately. Lt. Col. L. responded by coming into Dr. Fernandez' work area, dropping the paperwork next to her, and lowering

her face to within an inch or two of Dr. Fernandez' face, whispering, "I haven't begun f***ing with you." As a result of this confrontation, Dr. Fernandez began to shake and cry. Lt. Col. L. walked away with a smile on her face. Dr. Fernandez was left feeling physically threatened and legitimately afraid. In order to protect herself, Dr. Fernandez prepared an Incident Report the next day and e-mailed it to Lt. Col. Thomas K., the Division Chief of P21, Lt. Col. L. and others within NSA. Dr. Fernandez told Lt. Col. Thomas K. that she believed that Lt. Col. L.'s conduct was an EEO matter.

On September 2, 1999, Dr. Fernandez was called into a meeting by Col. M. Lt. Col. Thomas K. also attended the meeting. During the course of this meeting, Col. M made repeated references to the tendency of Dr. Fernandez to react emotionally to situations. He also indicated that he did not like emails because they were impersonal and tended to be emotional. Dr. Fernandez responded that she would attempt to curtail her use of emails as much as possible, but that she had been advised to document everything concerning the incident with Lt. Col. L. Col. M. advised Dr. Fernandez to "disengage and walk away if emotions come into play."

Beginning in January of 1999, Dr. Fernandez had begun to notice a pattern of behavior by Lt. Col. Thomas K. that was troubling to her. Like Lt. Col. L., Lt. Col. Thomas K. showed a pronounced preference to dealing with Dr. Fernandez' male, ex-military subordinate rather than relating to her. He excluded Dr. Fernandez from general mailings to

Division personnel. He refused to support Dr. Fernandez when she attempted to correct her male subordinate's conduct. He used sexual innuendos to Dr. Fernandez in referring to her relationship with another military officer that Dr. Fernandez regarded as a mentor.

Lt. Col. Thomas K.'s behavior was described by co-workers in the following ways. Michele S., a civilian, female in a management position at NSA answered an EEO Interrogatory as follows:

> 18. Ms. Fernandez alleges that Col. K. favored her male subordinates over her, dealing with them whenever possible, but not with her. Please indicate whether or not Col. K. avoided dealing with Ms. Fernandez.
>
> Col. K. treated men better than women all of the time.

Sharon P., another female civilian working with Dr. Fernandez and Lt. Col. Thomas K. responded to the same EEO Interrogatory in this fashion:

> I know that subordinate personnel coordinated directly with the division level and did not always include/use the chain of command. For instance, my male subordinates went to Col. K. directly and did not provide information to me – then I would be out of the loop of knowledge.

During the EEO investigation, Richard W., Deputy and later Division Chief of P2, was asked to respond to the following question concerning the inner workings of P2:

> Do you have any additional information that you believe is pertinent to Ms. Fernandez' complaint of discrimination based on race, national origin, sex and age? Do you believe she has been discriminated against based on the above mentioned basis?

He responded:

> Col M. and Lt. Col. K all said in a meeting, with me present , and after Maria left, while discussing organizational needs, what are we going to do with Hedda [civilian, female manager]. Ken M., Deputy Chief P2, who was supportive of what [Lt. Col.] K. and [Col.] M. did was also in that chain of command. I believe that through subtle actions that the P2 organization senior management was discriminatory. His (Ken M.'s) position was advertised at a SCE status which I believe was deliberately done to exclude Ms. Hedda E. from getting this position. I had intuitive sense that there was an air of discrimination in that process with Hedda E. The important thing here is that Sharon P. and Maria Fernandez left the organization and they were female civilian branch chiefs. And then there was Hedda who was being talked about by the management chain on what they were going to do with her. The management team and

> organization was dysfunctional and I say that strongly. All the new civilians in the organization were direct hires from 1998 and were former military, mostly retired military. I believe in some sense Maria experienced some sense of discrimination and the reason for that is multiple, predominate civilians in that organization were "classic" NSA civilians. Culturally that organization was different because they did not grow up in the NSA culture. Sharon P., Maria Fernandez and Hedda E. were "classic" NSA civilians working in a Military environment. Col. M. was a poor leader and organizer, and had no experience in the business of NSA and also was unprincipled.

After reporting the August, 31, 1999 incident concerning Lt. Col. L., Lt. Col. Thomas K. began to exhibit an increasingly hostile attitude toward Dr. Fernandez. He took no action with regard to Lt. Col. L. and the threats made against Dr. Fernandez and, in fact, attempted to defend Lt. Col. L.'s actions. Eventually, on September 27, 1999, Lt. Col. Thomas K. presented Dr. Fernandez with a proposal for a written reprimand based upon several alleged incidents, including the incident with Lt. Col. L. on August 31, 1999. Lt. Col. K. charged that Dr. Fernandez, by her own admission, "created a disturbance in the office by engaging in loud, disruptive behavior which disrupted the entire workplace". The apparent source of Lt. Col. K.'s conclusion was the incident report filed by Dr. Fernandez in which she stated that she approached Lt. Col. L. "publicly and loudly" in order to obtain the information that had been withheld from her for

months. Dr. Fernandez explained that she used the words, "publicly and loudly" in order to convey the idea that others were witness to her request for information, and that others heard her request for information. At no time did Dr. Fernandez admit to abusive, foul or disruptive behavior or language. That conduct was reserved to Lt. Col. L. whose rude, foul and physically intimidating response caused Dr. Fernandez to break down in public. Moreover, although the exact nature of the threat made by Lt. Col. L to Dr. Fernandez had been documented by Dr. Fernandez and included in the incident report, Col. M. misconstrued the incident in this fashion:

> L. found the documents in a storage bin, leaned over Maria's shoulder and said, 'I'm not withholding information from you. If I were f--- ing with you, you would know it. Is that a physical threat? Is it based on age, sexual harassment, national origin, etc.? I have a hard time seeing that. That is the only substantiated incident raised to my level.

The proposed reprimand letter was given to Dr. Fernandez at a meeting attended by Lt. Col. K and Michael C., an Employee Relations Representative. According to Michael C., he explained to Dr. Fernandez that she had a right to appeal the proposal and that in that case, the matter would be forwarded to Col. M. for final disposition. Col. M. could sustain, decrease or set aside the reprimand. Although Dr. Fernandez felt unsupported and had lost trust in the process, she did appeal and respond to all of Lt. Col. K's accusations. The review by Col. M. turned out to be illusory, however, because he

and Lt. Col. K. had already made the determination to jettison Dr. Fernandez. Lt. Col. K. provided the following sworn testimony:

> 14. The Complainant alleges that you repeatedly attacked her and her competency (including the reprimand) based on the word of males. Please respond.
>
> Maria did that to me. I did the written reprimandunder the recommendations of Employee Relations. We had a volatile situation and we wanted to quell the situation. We believed the best way to do that (and it was both in Ms. Fernandez's and the Office's best interest) was to move Maria out of the P21 environment and into a different office. * * *

In November, 1999, Dr. Fernandez was forced to transfer out of P211 to another NSA branch known as N712, and in December, 1999, she filed a formal EEO Complaint regarding her treatment in P2, naming Lt. Col. L, Lt. Col. K. and Col. M as her primary antagonists.

Unfortunately, Dr. Fernandez' dealings with Lt. Col. K did not end upon her transfer to N712. On February 29, 2000, three (3) months after she had moved to N712, Lt. Col. K. issued Dr. Fernandez' personal performance process evaluations ("P3"). One of the evaluations had been due on April 6, 1999, almost a year before it was issued. The P3 issued by Lt. Col. K. for the period from July, 1999 to October, 1999 included unfavorable information

concerning forwarding information that was not ready for field consumption.

Lt. Col. K. acknowledged that he "procrastinated" on sending the P3, and that when he did finally send it, he forwarded courtesy copies by e-mail to Mr. S., her new supervisor at N712, and to Ms. Patricia S. of P2, "because they were interested in the status of her P3". Dr. Fernandez alleged that Lt. Col. K.'s procrastination was deliberate retaliation against her for having filed an EEO complaint against him, Col M. and Lt. Col. K. because he knew the effect that his "procrastination" would have on her employment with NSA. For example, as a result of the failure to file the P3 in a timely fashion, Dr. Fernandez could not be considered for positive personnel actions, such as promotions or awards during the 1999/2000 promotion cycle. Lt. Col. K's "procrastination" also effectively precluded Dr. Fernandez from challenging the contents of the P3 and therefore adversely impacted her ability to receive promotions and awards in the future.

These facts, and more, were presented by way of documentary evidence and affidavit to the trial court in support of Dr. Fernandez's claims of hostile work environment, disparate treatment and retaliation. Indeed, the trial court appeared to acknowledge the existence of military bias against civilians within NSA, but simply concluded that it was based on civilian status, not gender. The trial court stated:

> Fernandez's hostile work environment claim fails because she does not show that the alleged harassment by [Col.] Charlene L., [Lt. Col.]

> Thomas K. or other members of P2 was based on Fernandez's gender or national origin. * * *
>
> Sharon P. testified she believed that Fernandez was 'exposed to a hostile work environment' and noted that 'the work environment was difficult because she was a pure female civilian'. Sharon P. Aff. sec. 23, 25. However, Sharon P. did not recount any specific acts of harassment, directed at either Fernandez or her, that she attributed to gender discrimination. Sharon P. did mention that her male superiors deliberately bypassed her in the chain of command, id, sec. 23, but deliberately bypassing a superior does not rise to the level of actionable harassment, nor is it clear that this behavior was motivated by Sharon P.'s gender rather than her civilian status. * * *
>
> In sum, Fernandez does not offer evidence, besides the conclusory statements in her briefs and affidavits, to show that the alleged harassment was based on her gender and national origin. *See Causey*, 162 F. 3d at 802 ('[C]onclusory statements, without specific evidentiary support, cannot support an actionable claim for harassment.'). To the contrary, the evidence on the summary judgment record indicates that, to the extent Fernandez was treated differently than others, it was due to her personality conflicts with military (i.e. non-civilian) co-workers.

With all due respect to the lower court's opinion, the Appellant suggests that the reality of life at NSA is that the type of discrimination practiced there is not exclusively directed at civilian status or gender. Rather, it is both. And the fact that one type of discrimination does not violate Title VII, does not

mean that the other, which does violate Title VII, may live and flourish behind skirts of the former.

An examination of the facts of this case reveals an abundance of evidence that involved professional disparagement and de-qualification , attempted intimidation and unequal treatment. The entire imbroglio began with Lt. Col. L berating Dr. Fernandez's qualifications, the need for her position, her ability to manage a male, ex-military subordinate. When she reacted to vile and abusive behavior, she was then accused of crating a scene and being overly emotional. These incidents are clear examples of gender stereotyping forbidden under Title VII. *See, for example, Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) wherein Justice Marshall in a concurring opinion stated:

> By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from 'refusing to hire an individual based on stereotyped characterizations of the sexes.' Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. sec. 1604.1 (a) (1) (ii). See *Bowe v. Colgate-Palmolive Co.*, 416 F. 2d 711 (CA7 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (CA5 1969).

Moreover, the fact that some portion of the hostile environment was created by a member of the same sex does not mean that there is no Title VII violation (See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)). Nor does the fact that the

discrimination in this case was based on two factors, one lawful and the other not (so called "sex plus" discrimination") mean that the illegal discrimination is excused. *Phillips v. Martin Marietta Corp.*, *supra*.

To fail to recognize that the acts committed against Dr. Fernandez at P2 constitute a form of gender bias violates both the spirit and letter of the Civil Rights Act of 1964 and the rulings of this Court and does great injustice to the many female civilian managers working with military personnel in our federal agencies.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

MARIA C. FERNANDEZ,

Petitioner,

v.

MICHAEL V. HAYDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIA C. FERNANDEZ *

v Civil No. JFM-04-3009

LT. GEN. KEITH ALEXANDER, *
DIRECTOR
NATIONAL SECURITY AGENCY *

* * * * * *

MEMORANDUM

Plaintiff Maria Fernandez brings this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964 against Defendant Lieutenant General Keith Alexander, in his official capacity as Director of the National Security Agency ("NSA"). Fernandez alleges that individuals at the NSA discriminated against her because of her national origin, gender, and participation in the equal employment opportunity ("EEO") process. The NSA moves to dismiss the case or, in the alternative, for summary judgment. Fernandez moves for an opportunity for discovery under Federal Rule of Civil Procedure 56(f). For the reasons stated below, the NSA's motion is treated as a motion for summary judgment with regard to Count I, and granted. The NSA's motion is treated as a motion to dismiss with regard to Count II, and denied. Fernandez's motion for an opportunity for discovery is denied as to Count I and granted as to Count II.

I.

Fernandez, a naturalized American citizen of Cuban origin, joined the NSA as a civilian employee in 1983. In August 1998, she accepted the position of Branch Chief of an organization called P211 that was located in the Agency's Tactical SIGINT Program Office ("P2"). As the P211 Branch Chief, Fernandez initially reported to John M., the Division Chief of the P21 Division, and then to Lieutenant Colonel Thomas K., the Deputy Chief of P21 as of September 1998.[1]

Thomas K. subsequently replaced John M. as P21's Division Chief in June 1999. Fernandez supervised four employees in P211, three of whom were male (one civilian, two military).

Fernandez and the NSA tell different stories about the work environment in P21. According to Fernandez, "women received less favorable treatment than men." Fernandez Aff. of Factual Allegations ¶ 6. Fernandez alleges that "women supervisors were criticized and undermined and their male subordinates were given access to information and documents." *Id.*

1Pursuant to the protective order entered in this case, NSA personnel other than Fernandez will only be identified by their titles and/or first names and last initials.

According to the NSA, and consistent with the overwhelming evidence in the record, Fernandez's problems at P21 stemmed from her domineering and controlling personality. Coworkers of Fernandez describe her as an extremely difficult person with whom to work. Her former subordinate Christopher S. called her "erratic," "unpredictable," "control oriented," and "defensive." Christopher S. Aff. ¶ 5. John M. testified that Fernandez had problems as a manager because she was "very controlling." John M. Aff. ¶ 5. Michele S., Chief of the Budget Branch of P2, testified that people in the office thought Fernandez had a psychological problem and "might need help." Michele S. Aff. ¶ 23.

On September 29, 1999, Thomas K. proposed and presented to Fernandez a written letter of reprimand based on several alleged instances of disrespectful and insubordinate behavior. *See* Def.'s Mot. to Dismiss, Ex. 13. The letter recounted several occasions in which Fernandez was verbally abusive to others, and one instance in which she refused to comply with Thomas K.'s order to rescind an e-mail she had sent around the office describing an incident between her and Lieutenant Colonel Charlene L., the chief of another branch within the P21 Division. In this email, entitled "MFR - Incident Report," Fernandez claimed Charlene L. cursed at her and threatened her.[2] *See* Def.'s Mot. to Dismiss, Ex. 16.

2Charlene L. admits using a curse word but claims she did not threaten Fernandez. Charlene L. Aff. ¶ 9.

On October 12, Fernandez provided written and oral responses to the proposed letter of reprimand and advised management of her intent to contact an EEO counselor. Fernandez initiated contact with an EEO counselor that day. After a lengthy discussion, Fernandez determined that her issues were not EEO based, and she signed a non-EEO related "Counseling form." *See* EEO Counselor's Report, Def.'s Mot. to Dismiss, Ex. 19 at 2. On October 19, Colonel Leslie M., Chief of P2, upheld the decision to issue Fernandez the reprimand. At various times, Fernandez has claimed Leslie M. "fired" her that day, while at other times she has said he merely ordered her to take leave. *Compare* Fernandez EEO Aff. at 10 *with* Compl. at 6. Leslie M. claims he and Fernandez both agreed she should leave P2, and he offered his assistance in finding her a new position. Leslie M. Aff. ¶ 6. His account is bolstered by the Employee Relations Representative who attended the meeting, Michael C., who insists Leslie M. "NEVER ordered Ms. Fernandez to take leave." Michael C. Aff. ¶ 9.

On October 26, Fernandez returned to the EEO office and stated she had recently taken EEO courses and, based on the material presented, now believed she had been subjected to a hostile work environment based on her gender and possibly her national origin. Fernandez filed a formal EEO complaint on December 21, in which she alleged that Charlene L., Thomas K., and Leslie M. discriminated against her from at least January 1999 through October 19, 1999, based on her gender, age, national origin, and participation in the EEO process, culminating in a written reprimand and her

"dismissal" from her position. *See* Pl.'s Opp'n, Ex. I. More specifically, Fernandez alleged Charlene L. favored a male subordinate (Christopher S.) over her, humiliated her in public, and used profanity in a threatening way toward her. Thomas K. allegedly favored Christopher S., encouraged insubordination, excluded Fernandez from correspondence, and made sexual innuendos about Fernandez's relationship with a military officer. Leslie M. allegedly retaliated against Fernandez's participation in the EEO process by upholding the written reprimand. The NSA conducted a formal investigation into Fernandez's complaint and issued an Investigative Summary. *See* Def.'s Mot. to Dismiss, Ex. 3.

On January 31, 2001, following the investigation, Fernandez requested a hearing before the Equal Employment Opportunity Commission ("EEOC"). On August 2, 2002, however, the EEOC Administrative Judge dismissed the hearing and ordered the Agency to take appropriate action because Fernandez engaged in "intolerable" behavior during the course of discovery. *See* Def.'s Mot. to Dismiss, Ex. 4. The judge noted that Fernandez had (1) unnecessarily delayed the case with numerous objections to a protective order the NSA desired; (2) abruptly cancelled two scheduled depositions; and (3) refused to participate in her own deposition when the NSA would not allow a court reporter she had hired to attend. The judge sanctioned Fernandez in the amount of $308.50 for reimbursement of fees the NSA incurred due to her failure to proceed in the matter. The NSA issued a final agency decision on September 17, 2002, determining that Fernandez was not discriminated against. *See* Def.'s Mot. to

Dismiss, Ex. 5. Fernandez appealed, and the Office of Federal Operations upheld the agency decision on March 24, 2004.

Fernandez alleges that, while her EEO complaint was pending, she was repeatedly retaliated against. She filed numerous complaints with the EEO office, including at least four complaints in 2001, three in 2002, and one in 2004. Many of these complaints alleged discrimination in the processing of previous complaints by Fernandez. During this time, Fernandez was working in a new position in a different section of the NSA called N712. Fernandez obtained this position in November 1999.

On February 29, 2000, three months after Fernandez's move to N712, Thomas K. belatedly issued her personal performance process evaluation ("P3"), which had come due on April 6, 1999. Fernandez received a rating of 3.3, indicating she had "met objectives" from October 1, 1998 to April 6, 1999. *See* Def.'s Mot. to Dismiss, Ex. 11. Fernandez alleges Thomas K. also issued a P3 at this time for her performance from July 1999 to October 15, 1999, and included unfavorable information in this evaluation: "On one occasion, Ms. Fernandez forwarded information that was not ready for field consumption, however, this did not adversely affect the TSPO." Fernandez EEO Aff. at 11.

Fernandez further alleges that two supervisors in N712, Nancy N. and Nancy D., retaliated against her beginning in early 2002, immediately after the Office of General Counsel ("OGC") informed the Director of N712 about Fernandez's December 1999 EEO

complaint. Fernandez avers that Nancy N., her supervisor in 2001-02, retaliated against her, but Fernandez does not specify a single incident. *See* Fernandez Aff. of Factual Allegations ¶ 11. Fernandez alleges Nancy D., her supervisor in 2002 until October 2003, retaliated against her by giving her verbal approval to work flexible work hours due to a medical condition but then gave her such a heavy workload that she was forced to work long hours and weekends to meet deadlines. Nancy D. then allegedly held Fernandez to a schedule of not more than a normal workday, refused her requests to work the extra hours necessary to complete assignments, and did not provide her with the contractor support that was given to at least one other employee performing the same duties, Thomas D. Fernandez alleges three attorneys from the OGC, Paul F. M., Christopher D., and Dawn B., retaliated against her by threatening to alter her EEO records, advising her former co-workers they could not communicate with her for any reason, falsely accusing her of willfully disclosing confidential information, and helping N712 management issue a "Leave Letter" to her in May 2003. Nancy D. and Dawn B. issued the Leave Letter, which advised Fernandez she must adhere to a set work schedule or face disciplinary action. Fernandez claims such letters are usually issued to employees with deficient work attendance, and her attendance was not deficient. Fernandez challenged the letter and it was later rescinded. Nancy D. then allegedly falsified Fernandez's performance evaluation in the fall of 2003, denied her access to records she needed to do her work, and falsely advised a supervisor that

Fernandez had created a hostile work environment for Nancy D. in April 2004.

In her complaint, Fernandez alleges that these retaliatory actions by employees of N712 and the OGC resulted in her failure to receive a promotion to GG14 in June 2004. *See* Compl. at 9. In her latest brief, Fernandez goes a step further and claims that the NSA's decision not to promote her was based on a retaliatory motive. *See* Pl.'s Resp. to Def.'s Supplemental Mem. at 11. The NSA claims the decision not to promote her was due to insufficient funds. Fernandez later switched positions again and joined another section of NSA called F1J. She was eventually promoted to GG14 in 2005, the following promotion cycle.

On December 17, 2004, Fernandez filed a formal complaint with the EEO alleging that she was discriminated against based on disability, national origin, gender, age and reprisal when she was not promoted in June 2004. In May 2006, the EEO dismissed the administrative complaint, apparently because Fernandez had filed a Title VII lawsuit in this court on September 20, 2004, three months prior to filing her administrative complaint. In her Title VII complaint, Fernandez drops any allegation of age discrimination and tempers her claim that she was fired by Leslie M. in October 1999 -- she now alleges Leslie M. ordered her to stop almost all of the work she was doing and to take leave. Compl. at 6. Otherwise, Fernandez asserts essentially the same claim of gender, national origin, and reprisal discrimination, based on conduct by members of P2,

that appeared in her administrative complaint.[3] This claim will be referred to as Count I. Fernandez also brings a claim of retaliation based on conduct from November 1999 to the present by members of other divisions of the NSA.[4] This claim will be referred to as Count II. I will examine the two claims separately.

---

3 All of this conduct occurred between 1998 and October 1999, with the exception of Thomas K's issuance of Fernandez's P3 in February 2000.

4 In her complaint, Fernandez includes language suggesting she also brings a gender and national origin discrimination claim based on conduct from November 1999 to the present. Compl. at 9. However, in her latest brief Fernandez disavows this claim and insists her "allegations of civil rights violations within the N712 organization are based exclusively on retaliation/reprisal, and not any other form of discrimination." Pl.'s Resp. to Def.'s Supplemental Mem. at 3.

II.

In Count I, Fernandez alleges a hostile work environment claim, a disparate treatment claim, and a retaliation claim, all based on conduct by members of P2.[5] None of these claims survives summary judgment.[6]

---

5 Fernandez indicates in one of her briefs that she may amend her complaint to add a constructive discharge claim, but she has not done so. On the existing record, such a claim would not survive summary judgment because Fernandez does not provide evidence of deliberateness of the employer's action. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985).

6 Summary judgment is proper where there is no genuine issue of material fact and the moving party proves that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. When assessing a motion for summary judgment, the court must draw all justifiable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Id.* at 587. The mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Mere speculation by the non-moving party cannot create a genuine issue of material fact. *Cox v County of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001).

A.

To establish a hostile work environment claim, a plaintiff must show that: (1) the harassment was unwelcome; (2) the harassment was based on her gender or national origin; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *See Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). With regard to the second prong, a plaintiff must show that but for her gender or national origin, she would not have been the victim of the alleged discrimination. *Id.* Fernandez's hostile work environment claim fails because she does not show that the alleged harassment by Charlene L., Thomas K., or other members of P2 was based on Fernandez's gender or national origin.

Fernandez points to the affidavits of civilian employees Michele S. and Sharon P., a branch chief in P21, as evidence of harassment based on gender. Although Michele S. testified that Thomas K. "treated men better than women all the time," she also testified that she never felt discriminated against because of her gender and never saw any discrimination involving Fernandez. Michele S. Aff. ¶¶ 18, 23. Michele S. described the divide in the office as based on military-civilian status rather than gender. *Id.* ¶ 23. Sharon P. testified she believed that Fernandez was "exposed to a hostile work environment" and noted that "the work environment was difficult because she was a pure female civilian." Sharon P. Aff. ¶¶ 23, 25. However,

Sharon P. did not recount any specific acts of harassment, directed at either Fernandez or her, that she attributed to gender discrimination. Sharon P. did mention that her male superiors deliberately bypassed her in the chain of command, *id.* ¶ 23, but deliberately bypassing a superior does not rise to the level of actionable harassment, nor is it clear that this behavior was motivated by Sharon P.'s gender rather than her civilian status. The only incident Fernandez describes that even touches on national origin is a remark allegedly made by Thomas K. that another Hispanic NSA employee was "worthless." Fernandez EEO Aff. at 5. There is no evidence this comment had anything to do with the Hispanic employee's national origin.

In sum, Fernandez does not offer evidence, besides the conclusory statements in her briefs and affidavits, to show that the alleged harassment was based on her gender and national origin. *See Causey*, 162 F.3d at 802 ("[C]onclusory statements, without specific evidentiary support, cannot support an actionable claim for harassment."). To the contrary, the evidence on the summary judgment record indicates that, to the extent Fernandez was treated differently than others, it was due to her personality conflicts with military (i.e. non-civilian) co-workers.

B.

To make out a prima facie case of disparate treatment, a plaintiff must show, *inter alia*, she was subjected to an adverse employment action. *Settle v. Baltimore County*, 34 F. Supp. 2d 969, 991 (D. Md. 1999). An adverse employment action is an action

that negatively effects "the terms, conditions, or benefits" of employment. *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001). Simple harassment does not amount to an adverse action. *See Spriggs v. Pub. Serv. Comm'n*, 197 F. Supp. 2d 388, 393 (D. Md. 2002). Among the alleged harassment based on gender and national origin by members of P2, the only potential adverse employment action was Thomas K.'s issuance of the letter of reprimand. *See Nye v. Roberts*, 145 F. App'x 1, 6 (4th Cir. 2005) (holding that a letter of reprimand could constitute an adverse employment action under the employer's system of "progressive discipline").

To establish a prima facie case of discrimination in the enforcement of employee disciplinary measures under Title VII, the plaintiff must show: (1) that she is a member of the class protected by Title VII; (2) that the prohibited conduct in which she engaged was comparable in seriousness to misconduct of employees outside the protected class; and (3) that the disciplinary measures enforced against her were more severe than those enforced against those other employees. *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511 (4th Cir. 1993). If the plaintiff proves a prima facie case, the burden shifts to the employer, who must articulate a nondiscriminatory reason for the difference in disciplinary enforcement. *Id.* If the employer articulates such a non-discriminatory reason, the burden shifts back to the plaintiff to demonstrate that the employer's reasons are pretextual. *Id.* Fernandez has not established a prima facie case because she has not shown that the disciplinary measures enforced against her were more severe that those enforced against male

employees or employees not of Cuban origin.[7] Moreover, even if Fernandez had established a prima facie case, Thomas K. articulated legitimate, non-discriminatory reasons for the reprimand. Within the letter, he listed numerous incidents of inappropriate behavior by Fernandez. Fernandez has failed to show that the articulated reasons for the reprimand are pretextual, as is her burden. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 319 (4th Cir. 2005) (affirming grant of summary judgment to employer where plaintiff failed to show the employer's stated reason for the adverse employment action was pretextual).

C.

The anti-retaliation provision of Title VII applies only to "employer actions that would have been materially adverse to a reasonable employee or job applicant." *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2409 (2006). This means "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* The provision's standard for judging harm is an objective one, and "[a]n employee's decision to report discriminatory behavior cannot immunize that

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7 Fernandez makes a conclusory allegation that the behavior criticized in the letter of reprimand was tolerated when exhibited by Charlene L., a woman of U.S. national origin, but Fernandez offer no evidence that Charlene L. engaged in the inappropriate behavior attributed to Fernandez in the letter.

employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* at 2415.

To establish a prima facie case of discriminatory retaliation under Title VII, a plaintiff must demonstrate a causal connection between the materially adverse employer action and her engagement in a protected activity. *See Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 188 (4th Cir. 2004). As in the disparate treatment context, the employer may rebut the plaintiff's prima facie case by articulating non-retaliatory reasons for its actions. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994). The burden then shifts back to the plaintiff to prove the pretextual nature of those reasons. *Id.*

Fernandez's complaint alleges that her superiors in P2 retaliated against her in violation of Title VII after she initiated contact with the EEO counselor on October 12. Specifically, she alleges that (1) Thomas K. subjected her work to increased scrutiny and delayed and put unfavorable information in her P3, and (2) Leslie M. upheld the "unjustified" letter of reprimand, ordered her to stop almost all of the work she was doing, and ordered her to take leave. Compl. at 6.

The evidence in the record does not show that Thomas K.'s actions were materially adverse to a reasonable employee. First, besides Fernandez's bare allegation, there is no evidence of increased scrutiny of Fernandez's work. Second, there is no evidence the delay in her P3 cost her a promotion or harmed her in any way. Third, the "unfavorable information"

in the evaluation was merely the observation that, on one occasion, "Fernandez forwarded information that was not ready for field consumption, however, this did not adversely affect the TSPO." Fernandez EEO Aff. at 11. The record indicates that this was the *only* comment in the entire evaluation that could be construed as negative, and that overall Fernandez received a rating of average or above average. Thomas K. Aff. ¶ 8.

Assuming the actions of Leslie M. were materially adverse, Fernandez's only evidence that his actions were motivated by her participation in the EEO process is the fact that the actions took place subsequent to her contact with the EEO counselor.[8] Leslie M. provided legitimate, non-discriminatory reasons for his actions. The letter of reprimand speaks for itself, and Leslie M. said he moved Fernandez out of the office because she could not get along with others in P21. Leslie M. Aff. ¶ 6. Fernandez has not shown that these reasons were pretextual. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) ("mere knowledge on the part of an employer that an employee . . . has filed a discrimination charge is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee").

8The same is true for Thomas K.'s actions. Fernandez provides no evidence of discriminatory intent besides the timing of the actions.

D.

Fernandez argues I should not rule on a motion for summary judgment as to Count I at this stage because she is entitled to further discovery. In general, summary judgment should not be granted when the nonmoving party has not had the opportunity to discover information that is essential to her opposition. *See* Fed. R. Civ. P. 56(f); *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002). If a party believes that more discovery is necessary for her to demonstrate a genuine issue of material fact, the proper course is to file a Rule 56(f) affidavit stating that she could not properly oppose a motion for summary judgment without a chance to conduct discovery. *Harrods*, 302 F.3d at 244. "The purpose of the affidavit is to ensure that the nonmoving party is invoking the protections of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition." *Id.* The affidavit should "particularly specif[y] legitimate needs for further discovery." *Nguyen v. CAN Corp.*, 44 F.3d 234, 242 (4th Cir. 1995).

In support of her motion for an opportunity to conduct discovery on Count I, Fernandez has submitted an affidavit stating:

> At present, I have not yet been permitted to conduct discovery because the time for discovery under the Court's local rules has not yet begun. Therefore I have not been able to obtain evidence that would supply facts essential to justify my opposition to Defendant's

> summary judgment motion. I have a good faith belief that discovery will permit me to further establish facts, which support my claims as set forth in my Complaint and in my Memorandum.

Fernandez Aff. of Factual Allegations ¶ 25. This affidavit is not particularized; it does not articulate what facts Fernandez expects to uncover in discovery or from what sources. Moreover, the purpose of the affidavit is to ensure Fernandez is acting in good faith, and the evidence on the record calls her faith into question.

According to the EEOC Administrative Judge, Fernandez engaged in "intolerable" behavior during the course of discovery in the administrative phase of this proceeding. She unnecessarily delayed discovery with numerous objections to the wording of a protective order. Without ever seeking the judge's counsel, she unreasonably refused to submit to a deposition when the NSA would not allow her own personal court reporter on site. The record reflects that any inability Fernandez has in marshaling evidence to oppose the NSA's motion for summary judgment is due to her own conduct in the administrative phase.

Further, the evidence in the record is overwhelming that Fernandez's problems in P21 were caused not by any unlawful discrimination but by the fact that she is a difficult person with whom to work. When combined with the lack of a particularized affidavit and Fernandez's past overstatements of her claim (alleging age discrimination and averring she was

fired), this evidence strongly suggests Fernandez intends to engage in a fishing expedition. Her request for further discovery at to Count I is denied.

III.

In Count II of the complaint, Fernandez alleges she was retaliated against by employees of the NSA (outside of P2) from November 1999 to the present due to her participation in the EEO process. On this count, I will treat the government's motion as a motion to dismiss. I choose not to rule on a motion for summary judgment on Count II for two reasons. First, Fernandez's Rule 56(f) affidavit in support of her motion for an opportunity for discovery on Count II is slightly more particularized than her Count I affidavit. Second, and much more importantly, it appears Fernandez had no opportunity to conduct discovery in the administrative phase, through no fault of her own. Her attorney testified that the NSA's EEO office completed an investigation of Fernandez's Count II retaliation claim but refused to turn the investigatory file over to Fernandez. Greidinger Aff. ¶¶ 3, 7. The NSA then allegedly used parts of this file as exhibits to its motion to dismiss Count II. The NSA does not deny this allegation nor offer any explanation.

In support of its motion to dismiss, the NSA argues Fernandez has not alleged actions by NSA that were harmful to the point that they would dissuade a reasonable worker from making or supporting a

charge of discrimination.[9] *See Burlington N.*, 126 S. Ct. at 2409. To the contrary, on the face of the complaint Fernandez alleges that the NSA retaliated against her by: 1) creating documentation that falsely claimed she could not perform at a higher level; 2) preparing inadequate and inaccurate performance evaluations; 3) preparing inaccurate documents to falsely suggest she was insubordinate over time and attendance issues; 4) issuing a letter to her regarding the amount of leave she was taking for a chronic medical condition; and 5) undermining her with management. Without looking beyond the complaint, I find that, if true, these actions might be harmful enough to dissuade a reasonable worker from making or supporting a charge of discrimination.

9For purposes of a motion to dismiss, a court must accept as true all well-pleaded allegations of the complaint and must construe the factual allegations in the light most favorable to the plaintiff. *Hall v. Virginia*, 385 F.3d 421, 427 (4th Cir. 2004). A complaint should not be dismissed under Rule 12(b)(6) unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief. *Id.* In *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), the Supreme Court held that a complaint in an employment discrimination lawsuit need not allege specific facts establishing a prima facie case of discrimination. *Id.* at 510-511. However, the Fourth Circuit has not interpreted *Swierkiewicz* as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim. *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

A separate order is being entered herewith.

August 24, 2006

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIA C. FERNANDEZ *

v. Civil No. JFM-04-3009

LT. GEN. KEITH ALEXANDER, *
DIRECTOR
NATIONAL SECURITY AGENCY *

* * * * * * * * * *

ORDER

For the reasons stated in the accompanying Memorandum, it is Ordered that:

1. Defendant's motion to dismiss or alternatively for summary judgment (No. 31) is treated as a motion for summary judgment with respect to Plaintiff's claims based on discrimination by the P2 division of the National Security Agency (Count I), and it is granted;

2. Judgment is entered in favor of the Defendant on Count I;

3. Defendant's motion to dismiss or alternatively for summary judgment (No. 31) is treated as a motion to dismiss with respect to Plaintiff's claims based on discrimination by members of the National Security Agency outside of

the P2 division from November 1999 to the present (Count II), and it is denied; and

4. Plaintiff's motion for an opportunity for discovery (No. 41) is denied as to Count I and granted as to Count II.

August 24, 2006

/s/
J. Frederick Motz
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIA C. FERNANDEZ *

v. Civil No. JFM-04-3009

LT. GEN. KEITH ALEXANDER, *
DIRECTOR
NATIONAL SECURITY AGENCY *

* * * * * * * *

MEMORANDUM

Plaintiff has brought this action for employment discrimination against the Director of the National Security Agency (the "NSA"). The Complaint contains two counts. The first count alleges discrimination from August 1998 through October 1999 while plaintiff worked for the "P2 Organization" at the NSA. I previously granted a motion for summary judgment filed by the NSA as to that count. *Fernandez v. Alexander*, No. JFM-04-3009, slip op. at *1 (D. Md. Aug. 24, 2006). The second count of the Complaint alleges that plaintiff has been retaliated against from November 1999 to the present while plaintiff has worked for the "N712 Organization" of the NSA. I previously denied a motion for summary judgment by the NSA filed as to that count to permit plaintiff to conduct discovery. *Id* at *8. Discovery has been completed and the NSA has filed a renewed summary judgment motion. The motion will be granted.

In my judgment, an extensive statement of the facts is unnecessary and a brief statement of the reasons for my ruling will suffice. The reasons are as follows:

First, the claims asserted in count II are barred because plaintiff did not timely file an administrative charge concerning the claims asserted in that count. It is true that plaintiff's claims are for retaliation and that the Fourth Circuit has held that, generally, a new administrative charge need not be filed as to a retaliation claim. *See Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992). However, this holding is based upon the principle that the scope of a civil action is limited by the scope of the administrative investigation that could have reasonably been expected to grow out of a charge filed with the EEOC. Thus, a court may only exercise jurisdiction over claims encompassed within the EEOC charge or investigation and claims "like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the [EEOC]." *Nealon*, 958 F.2d at 590 (citations and quotation marks omitted). Here, prior to the institution of this suit, the only administrative charges filed by plaintiff related to events that occurred while she was working at the P2 Organization. The events giving rise to the claims asserted in count II involve a wholly different time frame, an entirely different work environment, and completely different actors. To interpret the holding in *Nealon* as permitting a civil action to be filed under these circumstances would undermine the judgment and directive of Congress that there be an administrative investigation into alleged violations

of Title VII laws before a civil action is instituted in court.

Second, the anti-retaliation provisions of Title VII apply only to "employer actions that would have been materially adverse to a reasonable employee or job applicant." *Burlington N. & Santa Fe Ry. Co. v. White*, --- U.S. --- 126 S.Ct. 2405, 2409 (2006). Most of the employment actions cited by plaintiff – including the "leave letter;" the performance evaluations that were quite good (but not as good as plaintiff wanted); the alleged denial of access to plaintiff by Nancy D to the "registry;" and, Nancy D's complaints about plaintiff relating to that incident – do not rise to that level.

Third, there is no evidence in the summary judgment record that the NSA prepared inaccurate documents to suggest falsely that plaintiff was insubordinate over time and had attendance issues.

Fourth, in regard to plaintiff's claim that she was denied a promotion during the 2004 promotion cycle in retaliation for her prior EEOC activity, the record demonstrates that (1) the person who made the decision not to promote plaintiff, Kelly M, was not aware of plaintiff's prior EEOC activity, and (2) plaintiff herself testified that Kelly M never took any discriminatory action against her.

Fifth, the evidence in the record is also insufficient to establish that the NSA created a hostile work environment in retaliation for plaintiff's prior EEOC activity. To the contrary, the record establishes that plaintiff's work environment was

not hostile at the N712 Organization. Until a manager decided that employees should be required to work during the Organization's "core work hours," plaintiff was, in effect, permitted to work during the hours that she wanted. Further, plaintiff's performance evaluations were always in the "exceeds objectives" range, even though three of the evaluations were completed by Nancy D and Nancy N, both of whom plaintiff alleges retaliated against her. Finally, although plaintiff did not receive a promotion in 2004, she did receive a $2,000 bonus that year, and she also received a promotion the following year.

In short, the record establishes that plaintiff's claims are without merit. A separate order is being entered herewith granting judgment in favor of the NSA against plaintiff.

Date: August 27, 2007

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIA C. FERNANDEZ *

v. Civil No. JFM-04-3009

LT. GEN. KEITH ALEXANDER, *
DIRECTOR
NATIONAL SECURITY AGENCY *

* * * * * * * * *

ORDER

For the reasons stated in the accompanying memorandum, it is, this 27th day of August, 2007

ORDERED

1. My prior ruling granting defendant's motion for summary judgment as to count I is incorporated by reference;

2. Defendant's motion for summary judgment as to count II is granted; and

3. Judgment is entered in favor of defendant against plaintiff.

/s/
J. Frederick Motz
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1118

MARIA C. FERNANDEZ,
Plaintiff-Appellant,

v.

MICHAEL V. HAYDEN, Lt. General,
Director of National Security Agency,
Defendant-Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frrederick Motz, District Judge. (1:04-cv-03009-JFM)

Submitted: December 31, 2008

Decided: January 12, 2009

Before WILKINSON, GREGORY and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Maria C. Fernandez appeals the district court's orders granting summary judgment to the Defendant in Fernandez's civil action and denying her motions to alter or amend judgment, for a protective order, and to compel. On appeal,

Fernandez contends the district court abused its discretion in refusing to allow her to conduct discovery as to count one of her complaint prior to summary judgment, and the district court erred in concluding that there was insufficient evidence of disparate treatment, of retaliatory action, and that Fernandez's alleged harassment was based on her gender to survive summary judgment. We affirm.

We review a district court's grant of summary judgment de novo, construing the facts in the light most favorable to the nonmoving party. Holland v. Washington Homes, Inc., 487 F.3d 208, 213 (4th Cir. 2007), cert. denied, 128 S. Ct. 955 (2008). We review for abuse of discretion the district court's refusal to allow discovery prior to granting summary judgment. Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244 (4th Cir. 2002); Nguyen v. CNA Corp., 44 F.3d 234, 242 (4th Cir. 1995).

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

With these standards in mind, we have reviewed the parties' briefs and the record and find no abuse of discretion or reversible error.

Accordingly, we affirm for the reasons stated by the district court. See Fernandez v. Hayden, No. 1:04-cv-03009-JFM (D. Md. Oct. 23, 2007; Aug. 27, 2007; Apr. 2, 2007; Aug. 25, 2006; Aug. 24, 2006; Sept. 26, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1118
(1:04-cv-03009-JFM)

MARIA C. FERNANDEZ

Plaintiff-Appellant

v.

MICHAEL V. HAYDEN, Lt. General
Director of National Security Agency

Defendant-Appellee

JUDGMENT

In accordance with the decision of this Court, the Judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of This Court's mandate in accordance with Fed.R.App.P.41.

/s/PATRICIA S. CONNOR, CLERK